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Supreme Court of the United States

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MAY 6 1943
CHARLES ELMORE CROPLEY
CLERK

OCTOBER TERM, 1942.

No. **1005**

W. K. ARCHER AND ERCELL G. WESTFALL, CO-
PARTNERS DOING BUSINESS AS W. K. ARCHER
AND COMPANY, PETITIONERS AND
APPELLANTS BELOW,

VS.

SECURITIES AND EXCHANGE COMMISSION,
RESPONDENT AND APPELLEE BELOW.

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE
EIGHTH CIRCUIT AND BRIEF IN SUPPORT
THEREOF.**

CARL V. RICE,
Kansas City, Kansas,
Counsel for Petitioners.



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APPELLANTS BELOW,

VS.

SECURITIES AND EXCHANGE COMMISSION,
RESPONDENT AND APPELLEE BELOW.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Honorable The Chief Justice and the Associate
Justices of the Supreme Court of the United States:

Your petitioners, W. K. Archer and ErCELL G. Westfall, co-partners, doing business as W. K. Archer and Company, in support of their Petition for a Writ of Certiorari to review the final judgment of the United States Circuit Court of Appeals for the Eighth Circuit, entered March 6th, 1943, affirming an order of The Securities and Exchange Commission, respectfully show:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This was a statutory proceeding by your petitioners in the United States Circuit Court of Appeals for the Eighth Circuit, to review an order of the Securities and Exchange Commission, who, after due hearing, revoked the registration of your Petitioners as brokers and dealers, and expelled them from the National Association of Securities Dealers, Inc., and the Chicago Stock Exchange. This order was entered June 13th, 1942. The Commission found your Petitioners guilty of various violations of the Securities Acts of 1933 and 1934, and the Circuit Court of Appeals decided that all the charges were sustained by sufficient evidence, and affirmed the above order on March 6th, 1943. Your Petitioners filed in said Court a motion for a rehearing, which was overruled on March 11th, 1943. The opinion of the Circuit Court of Appeals appears in 133 F. 2d 795 (Record 243).

B.

STATEMENT OF THE JURISDICTION OF THIS COURT.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, Ch. 229, Sec. 1, 43 Stat. 938 (28 U. S. C. A. 347.a), and under the same Act, Ch. 229, Sec. 8, 24 Stat. 940 (28 U. S. C. A. 350).

The Date of the Judgment to Be Reviewed.

The judgment of the Circuit Court of Appeals for the Eighth Circuit, affirming the order of the Securities and Exchange Commission was entered on March 6th, 1943, and a motion for rehearing was overruled on March 11th, 1943. This Petition, with supporting brief, and the certified record, are filed within three months next after the final judgment sought here to be reviewed.

**Statement of the Nature of the Case and the Rulings
Bringing the Case Within the Jurisdiction
of This Court.**

The nature of the case has been heretofore stated. The Circuit Court of Appeals ruled:

First: That the Commission's findings (R. 224) that your Petitioners willfully violated Section 15 (c) (1) of the Securities and Exchange Act, under these undisputed facts, was justified:

Petitioners purchased from another dealer one hundred shares of Dewey Portland Cement common stock. The dealer seller, a month after the purchase, was still unable to deliver the stock, which Petitioners had resold to a customer at a profit of \$75. Petitioners succeeded in obtaining a cancellation from their customer and on the same day notified the dealer by mail that such customer insisted on a \$300 cash settlement for the breach of contract. The dealer sent Petitioners that amount (Record 256).

Second: In answer to Petitioners' argument that the penalty inflicted by the Commission was too severe, as the offenses were venial and of the long past and should be modified by the Court, the Circuit Court of Appeals ruled that the penalty could not be so modified as it was within the powers conferred upon the Commission by the Congress (Record 259).

The jurisdiction of the Federal Court of this cause has not been questioned. Each of the rulings of the Circuit Court of Appeals is reviewable by this Court under the appropriate statutory provisions noted.

**Cases Believed to Sustain the Jurisdiction of This
Court.**

This Court is vested with jurisdiction under the statutory provisions heretofore specified. The cases submitted by Petitioners as the basis for the exercise of such jurisdiction, to review the judgment below, are cited here-

after in connection with Petitioners' reasons for the allowance of the Writ of Certiorari.

C.

THE QUESTIONS PRESENTED.

(1) Where a stock transaction between brokers fails of consummation because the seller is unable to deliver and has thereby incurred liability for his breach of contract, and the buying broker, using the mail for that purpose, falsely represents that his customer demands a stated sum as settlement for the nondelivery, which sum the seller remits to the buyer, is such action on the part of the buyer within the scope and purposes of Section 15 (c) (1) of the Securities Exchange Act? Or is it a matter of purely local concern, of State law and State action, and beyond Federal cognizance?

(2) Does the power given to the Circuit Court of Appeals by the Securities Act to modify any order of the Securities and Exchange Commission include power to modify the penalties imposed by the Commission?

D.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

(1) In affirming the ruling of the Securities and Exchange Commission in the Dewey Portland Cement case (R. 224) that a misrepresentation made in connection with a settlement of damages for an admitted breach of an executory contract of sale of shares of stock, was a violation of the Securities Exchange Act (Section 15 (c) (1)) and was within the scope of Federal power, the Circuit Court of Appeals has decided an important question of law which has not been, but should be, settled by this Court, and has decided a federal question in a way prob-

ably in conflict with applicable decisions of this Court, to-wit:

Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197, 59 S. Ct. 206, 214, 83 L. Ed. 126.

National Labor Relations Board v. Jones, etc., Corp., 301 U. S. 1, 57 S. Ct. 615, 81 L. Ed. 893.

Adams v. U. S., 208 U. S. 101, 28 S. Ct. 277, 52 L. Ed. 436.

Railway Retirement Board v. Alton Ry. Co., 295 U. S. 330, 55 S. Ct. 758, 79 L. Ed. 1468.

(2) In ruling that the penalty imposed by the Securities and Exchange Commission may not be modified by the Circuit Court of Appeals that Court has decided an important question of law which has not been, but should be, settled by this Court?

CONCLUSION.

Each of the questions presented is of grave public importance. Unless the opinion below is reviewed the question whether Federal laws and Courts may act on matters, otherwise totally local in nature, upon the sole ground that they originated in matters of a Federal nature, will be left in confusion and doubt. So, also, is it important that the construction of the court review section of the Securities and Exchange Act be settled by this Court, so that all men may know whether the judgment of penalties imposed by the Securities and Exchange Commission is final, without regard to proper relationship between offenses and their punishment.

Wherefore, your Petitioners pray that a Writ of Certiorari issue under the Seal of this Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the records and proceedings of said United States Circuit Court of Appeals in the case numbered and entitled on its docket

as Number 12329, *W. K. Archer and Ercell G. Westfall, co-partners doing business as W. K. Archer and Company, Petitioners, v. Securities and Exchange Commission, Respondent*, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment of said Circuit Court of Appeals be reversed by this Court; and your Petitioners pray that the certified copy of the record and proceedings of said United States Circuit Court of Appeals for the Eighth Circuit, filed with this petition, may be treated as a return to said Writ of Certiorari; and your Petitioners pray that they may have such other and further remedies as to the Court may seem appropriate and in conformity with law.

W. K. Archer,
Ercell G. Westfall,
Doing Business as W. K.
Archer and Company,
Petitioners.

CARL V. RICE,
Counsel for Petitioners.

